United States Court of Appeals

for the Second Circuit

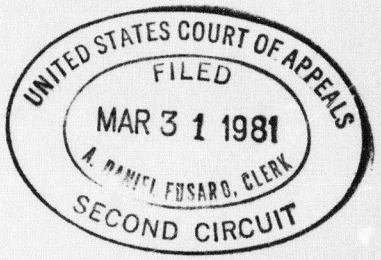
APPELLANT'S BRIEF

77-7177 B/RS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



JOHN F. MEEHAN and ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees

-against-

JOHN SNOW and JUDY SNOW,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7177

JOHN F. MEEHAN AND ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

In this case, plaintiffs served an amended complaint, by leave of the Court, which repeated a demand for damages allegedly due for legal services rendered and added two additional causes of action for defamation of plaintiffs by defendants alleged slanderous statements. Defendants' counsel through inadvertence, mistakenly confused the New York State

twenty-day time period allowed for service of an answer to an amended complaint with the ten day limit allowed within Federal procedure, and thus served defendants answer to the amended complaint ten days late.

Plaintiffs rejected defendants answer and moved for leave to enter a default judgment under F.R.C.P. 55(b)(2). Defendants' counsel's prompt response to this motion proved fruitless as Judge Werker granted plaintiffs' motion and granted defendants leave to move to vacate the default under F.R.C.P. 60(b)(1). Defendants thereupon moved to vacate the default judgment under Rule 60(b)(1). Judge Werker denied the motion on the exclusive grounds that defendants' counsel's conduct was not excusable under Rule 60(b)(1). Defendants appeal to this Court to reverse the District Court's Memorandum Decisions of February 2, 1977 and July 22, 1977 and the default judgments resulting therefrom based on five distinct, but related grounds for reversal set forth below.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion by finding that defendants' counsel's untimely service of 10 days duration of defendant's answer to the amended complaint

was not excusable under Rule 60(b)(1), in light of the mandatory liberal construction uniformly given to that rule?

2. Did the District Court commit reversible error in granting plaintiffs' motion to enter a default judgment under F.R.C.P. 55(b)(2) despite the lower standard of care required under that Rule and the well settled decisions governing the disposition of such motions in similar cases?

3. Did the District Court abuse its discretion by its refusal to consider the meritoriousness of defendants' defenses and counterclaims, the lack of prejudice to plaintiffs, the large sums of money involved in the litigation and other enumerated equitable considerations?

4. Did the District Court abuse its discretion by failing to find that the numerous equitable considerations surrounding the default in pleading outweighed the illusory benefits of judicial efficiency sought by the Court below in entering the defaults?

5. Did the District Court abuse its discretion by imposing the drastic remedy of default in light of defendants' counsel's minimal procedural error, which did not prejudice the plaintiff and which the defendants were not personally responsible for?

STATEMENT OF THE CASE

Plaintiffs, citizens of New York, are attorneys duly authorized to practice in the Courts of the State of New York. (A-24-A-29) Defendants are citizens of the State of Pennsylvania. Id. Diversity of citizenship constituted the jurisdictional grounds for the action. Id.

Plaintiffs allege performing professional legal services in the State of New York at the instance and request of the defendants between December 1973 and September 1975 for which the alleged amount due is $14,339.26 over and above all credits. Id. Suit was commenced in September 1975 in the Supreme Court, Orange County, New York by service of a Summons With Notice. Id. A complaint was served on defendants' attorneys on October 24, 1975 but prior to submitting an answer the action was removed to the United States District Court for the Southern District of New York by the defendants on November 20, 1975. (Docket A-2(1)). Thereafter, an answer denying the essential allegations of the complaint with counterclaims demanding $1,500,000 in damages alleging plaintiffs' negligence in the performance of their legal services was served upon plaintiffs' attorneys on December 19, 1975. (A-11-A-16)

In April, 1976, motion was made by plaintiffs seeking leave to serve and file an amended complaint, to correctly allege the capacity of the parties; to assert a pro-forma allegation of performance, and to add two causes of action on behalf of plaintiff John F. Meehan, for defamation based upon alleged slanderous statements made by defendants. (Docket A-2(10)) The motion was granted by Judge Werker granting leave to plaintiffs to serve an amended complaint. Id.

Plaintiffs' counsel served by mail, a copy of the amended complaint upon defendants' counsel on September 15, 1976. Id. Defendants' counsel served an answer to the amended complaint on October 8, 1976 (A-38), in effect restating all of the allegations of the original answer, the original counterlcaims asserted and adding allegations in the answer responding to the two additional causes of action asserted in the amended complaint. (A-30-A-38) A notice of rejection was served on defendants' counsel on October 15, 1976 annexing defendants' answer to the amended complaint based upon a late service of the answer to the amended complaint of ten days duration. (A-108-16)

On October 14, 1976, plaintiffs' moved to enter a default judgment based on defendants' default in pleading pursuant to F.R.C.P. 55(b)(2). Defendants opposed the motion and, in effect, applied for relief from the default pursuant to F.R.C.P. 55(c). (A-61-A-64) The Memorandum Decision of Judge Henry Werker filed February 2, 1977 granted plaintiffs' request to enter a default judgment, denied defendants' application to be relieved of their default, and further granted defendants leave to move to set aside their default under F.R.C.P. 60(b). (A-117-A-119)

On March 7, 1977, a default judgment was entered against defendants on plaintiffs first cause of action in the total amount of $15,528.51. In addition, it ordered a hearing to determine the damages on the 2nd and 3rd causes of action and dismissed defendants counterclaims and granted defendants 60 days to move to set aside their default. (A-120-121)

On April 1, 1977 defendants moved to vacate the default judgment under Rule 60(b)(1) and filed supporting Memorandum of Law, exhibits and affidavits. (A-122-162) Plaintiffs submitted answering papers and a Memorandum of Law to the motion. (A163-A218) Defendants served their reply affidavits in support of the motion. (A219-A238)

On July 22, 1977 Judge Werker's Memorandum Decision denied defendants' motion to vacate the default judgment. (A239-A243) An amended judgment was filed on October 14, 1977 staying enforcement of the judgment. (A-244)

Thereafter, on December 12, 1977, the action was referred to Magistrate Schreiber for the purposes of conducting an inquest on the plaintiffs' second and third causes of action to determine damages. (Docket A-5(42)) The case was reassigned to Judge Sweet on June 1, 1978 (Docket A-5) and further reassigned to Judge Lowe on August 1, 1978. The damage inquest was likewise reassinged to Magistrate Raby on February 5, 1979.(Docket A-5(46))

A hearing for an assessment of damages on plaintiffs' second and third causes of action lying in slander was held before Magistrate Raby on June 11, 1979, and a report thereon was filed on November 11, 1979, (Docket A-5(48)) recommending an award of $50,000.00 to plaintiffs on each of the two defamation causes of action, totalling $100,000.00.

Defendants filed objections to the reports on December 17, 1979 (Docket A-5(49)) which resulted in Judge Lowe's Memorandum Decision dated June 24, 1980 reducing the award to plaintiffs to $1,000.00 on each

defamation cause of action. (Docket A-5(51)) A supplemental judgment was entered or September 24, 1980 embodying Judge Lowe's decision. (A-245-A-246)

On October 22, 1980 defendants duly filed 3 notices of appeal from the default judgment filed on March 7, 1977; from the Memorandum Decision of Judge Werker filed on July 22, 1977 and from the supplemental judgment filed on September 24, 1980. (A247--A252)

SUMMARY OF THE ARGUMENT

The District Court, on plaintiffs' motion for leave to enter a default judgment, was dealing with defendants' default in pleading of ten days duration. Defendants untimely service of their answer resulted from defendants' counsel's good faith but mistaken assumption that the time limit under Federal rules was identical to the time limit prescribed under New York State procedure on filing answers to amended complaints. Defendants' counsel's confusion was caused, in part, by his hectic practice and by the fact that he is essentially a State court practitioner who was unfamiliar with F.R.C.P. time limitations. Upon receiving plaintiffs' Notice of Rejection of defendants' answer to the amended complaint and their motion for leave to enter a default judgment under Rule 55(b)(2), defendants' attorney promptly responded by

serving an opposing affidavit to plaintiffs' 55(b)(2) motion. However, Judge Werker granted plaintiffs' motion, and held defendants to the "higher burden" of a Rule 60 (b)(1) motion.

Defendants' attorney subsequently moved within the proscribed time to vacate the default judgment under F.R.C.P. Rule 60(b)(1) which empowers the Court to vacate a judgment on the grounds of mistake, inadvertance, suprise and excusable neglect. Defendants supported that motion with voluminous affidavits and exhibits which demonstrated the merit of defendants' defenses and counterclaims, i.e., the defendants' did not owe plaintiffs any money due to plaintiffs negligently performed services; defendants did not defame plaintiffs, and defendants were severly damaged by plaintiffs' negligent performance of legal services. Judge Werker, without even considering that extensive deomonstration on the merits, and the fact that plaintiffs suffered no prejudice, and the fact that the default subjected defendants to substantial losses, denied defendants' F.R.C.P. Rule 60(b)(1) motion on the exclusive ground that defendants' counsel's untimely answer was not excusable under 60(b)(1).

In light of those mitigating circumstances, Judge Werker's decision, engenders five independent,

though related reversible abuses of discretion.

1. A Court's discretion under Rule 60(b)(1) is limited by the fact that the Rule is equitable in nature and therefore, 1) must be liberally applied, 2) that default judgments are generally disfavored; and 3) that any doubts should be resolved in favor of setting aside the default judgment so that cases may be decided on the merits. Instead of adhering to these mandatory guidelines, the lower court strictly construed Rule 60(b)(1) in an arbitrary manner. Its harsh determination directly conflicts with Circuit Court rulings which have found that counsel's neglect was excusable under substantially the same circumstances and which reversed District Court decisions that found otherwise. Based on the judicial tendency to review lower court denials of 60(b)(1) applications carefully, the Circuit Court reversals under cases similar to the instant one, and the equitable principals underlying Rule 60(b)(1), the District Court's finding that defendants' counsel's error was not excusable constituted a reversible abuse of discretion.

2. When the issue is whether to enter a default judgment under F.R.C.P. Rule 55(b)(2), rather than to vacate an existing default judgment under Rule 60(b)(1) it is not necessary that the neglect or oversight on the part of counsel be excusable. The Courts have consistently ruled that plaintiffs were not entitled to a default

judgment under this lower standard of care, where, as in the instant case, the untimely filing was not caused by gross neglect, counsel acted promptly to cure, defendants asserted a meritorious defense, and plaintiffs would not be substantially prejudiced by allowing the defendants to answer on the merits. Despite these rulings, the District Court capriciously granted plaintiffs their 55(b)(2) motion. In light of the lower standard applied under that Rule and the precedent set forth herein, the District Court's ruling on Rule 55(b)(2) was a more serious abuse of discretion than its refusal to vacate its default judgments.

3. In deciding Rule 60(b)(1) and 55(b)(2) motions the Court should balance the need for efficient and speedy justice agianst the injustice which may result by the entry of a default judgment. Therefore, the determination that defendants' counsels' conduct was excusable or not excusable under 60(b)(1) should not be made in a vacuum, which is exactly what the District Court arbitrarily did in the instant case. In light of the fact that Courts uniformally consider whether granting of the 60(b) motion would prejudice the plaintiff and whether defendant presented a meritorious defense, in determining whether defendants' counsel's conduct should be considered excusable under 60(b)(1), Judge Werker's failure to consider these factors

constituted a reversible error . The lower court compounded its error by failing to consider defendants' counsel's promptness in responding to plaintiffs' Rule 55(b)(2) motion and by failing to consider the large sums of money involved. Certainly, in light of the spirit of Rule 6(b)(1) and 55(b)(2), the District Court should have at least acknowledged these two additional factors. Its failure to do so, further evidences the harsh, narrow interpretation it gave to Rules 60(b)(1) and 55(b)(2). The Court below, in effect, thwarted the judicial mandate uniformly respected -- i.e., that Rules 60(b)(1) and 55(b)(2) should be liberally construed with any doubts being decided in favor of permitting the case to be decided on the merits.

4. As noted above, the Courts are obliged to weigh the equities when faced with Rule 60(b)(1) and Rule 55(b)(2) motions. Upon weighing the many factors which courts have deemed relevant to those rules, it becomes clear that the District Court's failure to address these considerations resulted in arbitrary unjust decisions. The ten day default, the absence of gross neglect or willfulness, the fact that defendants' were not personally responsible for the error, the candor of defendants' counsel, the promptness of defendants' counsel in moving to cure his

mistake, the failure of plaintiffs' counsel to warn, the unduly punctual motion by plaintiffs under Rule 55(b), the large losses which the default imposed on defendants', the assertion of meritorious claims, the lack of prejudice to the plaintiffs, and the fact that defendants did not have their day in court, collectively outweighed the benefits of judicial efficiency vainly sought by the District Court in entering the default judgment. This is particularly true when viewed against the predictable further hearing necessary to determine damages on the defamation causes of action. The failure of the District Court to balance these elements in their appropriate weights was an abuse of discretion. However, even if this Court were to rule that it is unnecessary to weigh these factors in ruling on Rule 55(b)(2) and 60(b)(1) motions, the District Court's decisions still constituted an abuse of discretion. (See points 1,2, and 5)

5. In determining plaintiffs' motion for a Rule 55(b)(2) default judgment, a Court should not impose the most severe sanction that a Court can apply, i.e., default, unless it is faced with a clear record of delay or contumacious conduct by the defendant. Similarly, in determining whether there has been excusable conduct within the meaning of Rule 60(b)(1) a Court must determine whether

defendants' counsel's negligent conduct was so dilatory as to necessitate the imposition of a default. Upon this review, the Circuit Courts have not hesitated to overturn District Court default judgments for failing to execute its proper judicial discretion as is required under Rule 55 and 60(b). These reversals have been recorded even in cases where counsel engaged in far more severe disregard of procedure than did defendants' counsel in this case. Here, the imposition of the default, instead of a court reprimand or imposition of costs, as Judge Werker discussed, was an abuse of discretion, in the face of an insubstantial error which John and Judy Snow were not personally responsible for.

The cumulative effect of these five areas of abuse of discretion imposed a severe and inequitable injustice to defendants which should be remedied by reversal.

ARGUMENT

POINT I

IT WAS AN ABUSE OF DISCRETION FOR THE LOWER COURT TO REFUSE TO VACATE THE DEFAULT JUDGMENT UNDER F.R.C.P. 60(b)(1) IN LIGHT OF THE MANDATORY LIBERAL CONSTRUCTION GIVEN TO THAT RULE

The lower court refused to grant defendants' motion to vacate the default judgments it entered against the defendants on the exclusive grounds that defendants' counsel's mistake was not "excusable neglect" under F.R.C.P. 60(b)(1).

A motion under Rule 60(b)(1) is addressed to the sound discretion of the courts.[1] However, that discretion is limited by three important considerations:

> "First Rule 60(b) is remedial in nature and therefore must (emphasis added) be liberally applied; (cited cases and authorities omitted.) Second, default judgments are generally disfavored; whenever it is reasonably possible, cases should be decided on their merits (cited cases and authorities omitted) Third, and as a consequence of the first two considerations, '(w)here timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should (emphasis added) be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits"(Cases and authorities omitted)[2]

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1 See, Butner v. Neustadter, 324 F.2d 783, 786 (9th Cir., 1963), where the 9th Circuit reversed the District Courts ruling under 60(b)(1) stating that the discretion under Rule 60(b) is "a legal discretion to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." See, also, Wallace v. DeWerd, 47 FRD 4 (D.C., Virgin Islands, 1964), where the District Court refused to enter a default judgment against defendant even though he did not file an answer more than six months after the complaint was filed due to his lawyers' office misfiling of the complaint.

2 See Schwab v. Bullock's Inc., 508 F.2d 353 (9th Cir., 1974), where the Circuit Court ruled that the lower court abused its discretion in not vacating, even though the defendant corporation failed to answer for over two years after being constructively served. The corporation did not obtain actual notice because it failed to notify the Secretary of its change of address. See also, Silas v. Sears, Roebuck and Company, Inc. 586 F.2d 382 (5th Cir., 1978), where the Circuit Court found that the District Court had abused its discretion by refusing to vacate under 60(b)(1) even though plaintiff's counsel failed to appear at a scheduled pretrial conference; failed to prepare

cont'd.

Instead of applying to these required principals, it will be shown that the lower court strictly construed Rule 60(b)(1) in an arbitrary manner.[3]

Defendants' attorney in the instant case served his answer a mere ten days after the allowable time for answering an amended complaint under Federal rules had expired.[4] This untimely answer was not caused by the defendants personally[5] but was caused, in part by the flow

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2 cont'd.

a pretrial stipulation in disregard of the court's express order, and engaged in other dilatory conduct. See also Spann v. Commissioners of District of Columbia, 443 F.2d 715, 716, note 1 (District of Columbia, 1970), where the Circuit Court stated "Although relief under Rule 60(b) is discretionary with the trial court we think that the liberal spirit of the rule, together with the basic policy favoring resolution of litigation on the merits requires us to review closely (emphasis added) the exercise of that discretion in cases such as the instant one where denial of the motion has precluded consideration of the merits of the controversy."

3 See Medunic v. Lederer, 533 F.2d 891 (3rd Cir., 1976) where defendants counsel entered the case over two months after the complaint was served but the Circuit Court held that the District Court abused its discretion in construing Rule 55(b) strictly. The District Court apparently applied a strict standard because it erroneously confused Rule 60(b)(6) relief which requires an extraordinary showing with Rule 60(b)(1) which merely requires a demonstration of excusable neglect.

4 Plaintiffs' had served their amended complaint by mail on September 15, 1976 and defendants' counsel served defendants' answer upon plaintiffs by mail on October 8, 1976. Under F.R.C.P. 6(e) and 15(a) defendants had 13 days to answer since plaintiffs served the amended complaint by mail.

5 See next page

of defendants' attorney's hectic single practice,[6] and by defendants counselor, being essentially a State court practitioner, in good faith,[7] erroneously assumed that an answer to an amended complaint may be served within twenty days of service (twenty three (23) days if the amended complaint is served by mail as it was) and not the ten day period (thirteen (13) days if the amended complaint is served by mail) set forth in Rule 15(a).

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5 Although the Second Circuit has in the past imputed counsel's negligence upon defendants, in determining a 60(b) motion, that should not undercut the additional equity a party is entitled to where he was not personally responsible for the default. See Broglie v. Mackay-Smith, 75 FRD 739, 743 (D.C., Va., 1977), where the court stated it was "reluctant to attribute to the defendants personally, the neglect or errors of the legal representative where there has been no apparent negligence by the parties personally." See also Hassenflu v. Pyke, 491 F.2d 1094, 1095 (5th Cir., 1974) where the Fifth Circuit declared:

> "While we recognize a district court's authority to supervise and control its docket, parties should not be punished for their counsel's neglect except in extreme circumstances."

6 Although the name of defendants' law firm, implies a traditional law partnership, defendants' counsel Donald Rosenberg did not share professional service responsibilities with his prior partners.

7 The fact that defendants' attorney returned the answer within the state-limit demonstrates good faith. See Finch v. Big Chief Drilling Company 56 F.R.D.456 (D.C., Texas, 1972). Although the lower court undercut the importance of good faith, lack of wilfulness should be considered to be a very important factor in a 60(b) motion. See Rasmussen v. W.E. Hutton & Co., 68 F.R.D. 231 (D.C., Ga., 1975), where the court vacated a default despite the defendants' failure to present well justified reasons for their failure to answer for two months, in part because defendants "did not appear to have been in willful disregard of the process of the court."

Here, defendants' attorney did not hide behind bald assertions relating to the tardy answer, but candidly admitted the underlying facts which led to the error.[8] He promptly[9] responded to plaintiff's motion under Rule 55(b)(2) nine days after receipt.[10] It was for just such circumstances that Rule 60(b) was

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[8] This case is unlike Frank v. New Amsterdam Casualty Co., 27 F.R.D. 258 (D.C., Pa., 1961), where the District Court found wanting defendant's general conclusion that his counsel's failure to make a timely post-judgment motion was excusable neglect. See also, Ledwith v. Storkan, 2 F.R.D. 539 (D.C. Nebraska, 1942), where the court found wanting defendant's counsel's unparticularized claim that his failure to timely answer complaints was due to "other business and absence out of the jurisdiction."

[9] Plaintiffs' notice of motion pursuant to Rule 55(b)(2) was filed on 10/18/77 (Docket A-2(16)) and defendants filed their affirmation in opposition to that motion on 10/27/76. (Docket A-2(17))

[10] Although the District Court failed to even acknowledge defendants' promptness in moving to cure his mistake, the courts have given significant consideration to such a showing of diligence under Rules 60(b) and 55(b). See Thorpe v. Thorpe, 364 F.2d 692 (Cir. Court, Dis. of Columbia, 1966), where the Circuit Court approved the District Court's grant of a 60(b) motion despite the filing of an untimely answer because:

> "The philosophy of modern Federal procedure favors trials for the merits, and default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful." (emphasis added). See also, Rasmussen v. W. E. Hutton & Co., 68 FRD 231, 233 (D.C., Ga., 1975), where the court in granting a 60(b) request stated: "(a)nother factor that should be considered is the promptness with which the defaulting party acts."

enacted.[11]

This Court, itself, stated in Radack v. Norwegian American Line Agency, 318 F.2d 538, 542 (2nd Cir., 1963), in upholding the District Court's discretion to vacate despite a 15 month untimely entry that:

> "Rule 60(b) relief acts as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of his counsel's neglect."

Yet the District Court there ruled here that 60(b)(1) relief was inapplicable despite its concession that ordinarily courts are sympathetic to lawyers who are not familiar with court procedures.

This harsh determination directly conflicts with other Circuit Court rulings which found that counsel's neglect was excusable within 60(b)(1) under substantially the same circumstances, and which reversed District Court decisions that found otherwise. For example, in A.F. Dormeyer Company v. M. J. Sales and Distributing Co., 461 F.2d 40, (7th Cir., 1972), defendant's attorney mistakenly failed to timely file his answer with the clerk of the court because of the wording of the summons, and because of his longstanding experience in courts of New York where unless a summons sets forth the necessity for filing an

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[11] See Horn v. Intelection Corp., 294 F. Supp. 1153, 1155 (D.C., N.Y., 1966), where the District Court vacated under 60(b)(1). There, the defendant answered six months late because a clerk in defendant's attorney's office mistakenly returned plaintiff's service to the Secretary of State unopened. The Court found that "such an act would seem to be precisely that kind of "excusable neglect", or at the very least "inadvertence" contemplated by Rule 60(b)."

appearance and answer with the clerk, it is not necessary to file an answer until the date of trial. The 7th Circuit reversed the District Court's refusal to vacate under 60(b)(1), finding that the attorney's mistake was excusable especially since the defendant had alleged a meritorious defense, and promptly moved to vacate.

In Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir., 1969), plaintiff moved to vacate his default on defendant's counterclaim three days after the default judgment was entered due to a one-day untimely filing. The lower court refused to grant plaintiff's motion to file a reply to the counterclaim out of time under Rules 55(c) and 60(b). Citing this court's mandate in Radack, the Fourth Circuit found that the interest of justice would be best served by a trial on the merits and reversed.

In Blois v. Friday, 612 F.2d 938, 940 (5th Cir., 1980),[12] plaintiff's attorney failed to timely respond to defendant's motion for summary judgment because he neglected to file a notice of his changed address with the District Court, resulting in an untimely forwarding of defendant's motion for summary judgment to the attorney's new address. The Fifth Circuit found that the District Court had abused its discretion in denying plaintiff's 60(b)(1)

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[12] See also Trueblood v. Grayson Shops of Tennessee, 32 FRD 190 (D.C., Va., 1963), where the court granted a motion to vacate a default under 60(b)(1) which was entered due to defendant's failure to timely file even though the defendant had endeavored at every stage of the proceeding to create unnecessary trouble and expense for plaintiff's attorney.

motion, stating that:

> "(A) technical error or a slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true merits of his claim."[13]

In Tozer v. Krause Milling Co., 189 F.2d 242 (3rd Cir., 1951) the defendant corporation entered the case over a year after it was constructively served because it failed to inform the Secretary of the Commonwealth that its agent had moved and thus never received actual notice of plaintiff's claim until default judgment was entered. The Third Circuit found that the District Court had abused its discretion and vacated under a determination that defendants' counsel's conduct did constitute excusable neglect.[14] Under circumstances very similar to

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[13] See also U.S. v. Chevrolet Pickup, 56 FRD 459 (D.C., Texas, 1972), where the District Court found that plaintiff's failure to timely file a second required claim was excusable under 60(b)(1). See also Silas v. Roebuck & Company, 586 F. 2d 382 (5th Cir., 1978), where the Fifth Circuit ruled that the District Court exceeded its discretion by imposing the drastic measure of dismissal because there was no clear and consistent record of delay or contumacious conduct; see also Greater Baton Route Golf Association v. Recreation and Park Commission for the Parish of East Baton Route, 507 F.2d 227 (5th Cir., 1975), where the Circuit Court ruled that dismissal of the complaint was too harsh a remedy for counsel appearing 28 minutes late to a trial without notifying the District Court that he would be late. See also Connolly v. Papachristed Shipping Ltd., 504 F.2d 917 (5th Cir., 1974), where the 5th Circuit found the plaintiff's one day untimely delay in finding new counsel excusable under 60(b)(1) and reversed the District Court's refusal to vacate.

[14] See also Trueblood v. Grayson Shops of Tennessee, 32 FRD 190 (D.C., Va., 1963); Wolfsohn v. Raab, 11 FRD 254 (D.C.,Pa., 1951), where defendant's one day untimely filing owing to his attorney's miscalculation of time was found to be excusable neglect under 60(b)(1).

Tozer, the 9th Circuit in Schwab v. Bullock's, 508 F.2d 353, 356 (1974), vacated the District Court's default stating:

> "...the spirit of Rule 60 would not be served, and substantial justice would not be done, by pegging a $540,000 default judgment on a negligent act occurring some sixteen years earlier, unconnected in any way with an attempt to evade judicial process." [15]

This court, in La Barbera v. Grubard, 112 F.2d 738, 739 (1940), in upholding the Bankruptcy Court's finding that the bankrupt's attorney's failure to appear at a hearing was excusable neglect under 60(b) stated:

> "...discretion to avert injustice because of mistake or inadvertence of counsel should not be confined, and by the rule cited is not confined by arbitrary limitations."

Counsel's mistake in the instant case was not any more serious than the mistakes made by counsel in the aforementioned cases wherein the Circuit Courts found it to be an abuse of discretion for the lower courts not to have determined that counsel's conduct was excusable under 60(b)(1). In both A. F. Dormeyer Company, Inc. and the instant case, late filings (which resulted in no prejudice) were caused by State practitioners innocently and mistakenly confusing State procedure with Federal procedure. In both cases, counsel mailed plaintiff's

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[15] See also Butner v. Neustadter, 324 F.2d 783, (9th Cir., 1963), where the 9th Circuit reversed the District Court's default judgment under Rule 60(b)(1) despite the fact that the defendant was personally served, and failed to timely answer.

answers[16], further submitted meritorious defenses and promptly moved to cure. Yet when Judge Werker was confronted with Dormeyer, and the mitigating circumstances surrounding the instant default, he arbitrarily permitted a technicality to prevent the remedial relief authorized under Rule 60(b)(1).[17]

The District Court made its decision relying on cases which were either clearly off point or materially distinguishable. The Court failed to note that the instant case does not present a situation where the defendant's or counsel's credibility concerning their proferred excuses for default were subject to serious question.[18] Nor is this a case where the default was

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16 Here counsel had already diligently sent plaintiffs the answer and counterclaims prior to the time their amended complaint nullified defendants' answer and subsequently (untimely) sent plaintiffs, defendants' answer to plaintiffs' amended complaint. See(Docket Sheet A-2.)

17 The fact that defendants' counsel moved the case from the State courts to the Federal court is a distinguishing point, but it should not be deemed material in light of counsel's good faith, slight, innocuous error which he promptly attempted to cure.

18 See Aberson v. Glassman, 70 FRD 683 (D.C., N.Y., 1976), where a default was imposed on the defendant due to his failure to appear at his deposition despite being aware that plaintiff was seeking his deposition for a few months prior to the default. In his attempt to overturn the default, defendant swore that he did not go to his deposition, which was to be held in New York, because he was under doctor's instructions not to travel to New York from his home in California. However, in another case before the same District Court, the defendant swore that during the period when his health supposedly prevented him from attending the New York deposition, he spent five or six months in New York and commuted between New York and California on numerous occasions. Thus, in Aberson, the District Court was faced with a lying defendant, which is clearly not the case here. See also, Ledwith v. Storken, 2 FRD 539 (D.C., Neb. 1942), where plaintiff's attorney alleged that his failure to timely answer his client's complaint was due in part to his absence from the jurisdiction during the default period, but countershowings disclosed that

(cont'd on next page)

caused (in part or exclusively) by the defendant himself;[19] or where a party and/or his counsel engaged in persistent dilatory or contumacious conduct; [20] or where defendant had a chance to

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18 (Cont'd)during part of that period he was actually in the jurisdiction engaged in the normal pursuits of his law practice. This minority opinion which the lower court followed, erroneously interprets "mistake" "inadvertance" and "excusable neglect" to mean that even if the error is only slight, a default judgment is justifiable unless counsel can show that his error was due to sickness (or some other "heavy" excuse). But such a narrow interpretation conflicts with this Court's past discussion concerning Rule 60(b), the liberal interpretation given 60(b) by the majority of the circuits and notions of fair play.

19 See Aberson v. Glassman, 70 FRD 683 (1976) where defendant chose to answer questions through written interrogatories instead of appearing at his court-ordered deposition. See also, Gomes v. Williams, 420 F.2d 1364 (10th Cir., 1970), where failure to appear was caused by a defendant who claimed he mailed his summons to his attorney who never received it because it allegedly was destroyed in a mail truck fire. He could have (and should have) followed up with his attorney. Instead, he ignored his case for six months after merely mailing one letter. Gomes is clearly distinguishable from the instant case where we are concerned with a mere ten-day delay caused by the defendants' attorney's confusion. See also Torockio v. Chamberlain Mfg. Co, 56 FRD 82 (D.C., Pa., 1972) where plaintiff failed to supply his attorney with a document which was a jurisdictional prerequisite to the action. See also Ledwith v. Storken, 2 FRD 539 (1942), where the client failed to consult with his attorney concerning his case for six months after giving his attorney the summons and copies of the complaint despite the fact that one of the defendants had contact with her attorney on more than one occasion during that interval in connection with other litigation.

The instant case also does not involve a deferdant-corporation who engaged in frequent litigation but failed to make sure that its counsel timely made the proper post-trial motion. See Frank v. New Amsterdam Casualty Co., 27 FRD 258 (D.C. Pa., 1961).

20 See Slumbertogs v. Jiggs, etc., 353 F.2d 720 (2nd Cir. 1965), where in view of the dilatory and contumacious conduct of plaintiffs and their counsel, in virtual defiance of rules and orders of at least six judges, dismissal was warranted

present the merits of his case;[21] or where the time for appealing the default judgment expired;[22] or where the plaintiff gave defendant every opportunity to cure his untimely filing;[23] or where plaintiff's attorney recklessly failed to timely file a document which constituted a jurisdictional prerequisite;[24] or where the defendant entered the case after an unreasonably long delay.[25]

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21 See Cox v. TWA, Inc. 20 FRD 298 (D.C. Missouri, 1957) where the court ruled that judgment would not be vacated based on new collateral evidence. See also, Frank v. New Amsterdam Casualty Co., 27 FRD 258 (1961), where the court stated that the fact that the defendant had its day in court "must be strongly considered" under a 60(b) motion.

22 See I.C.C. v. Vesco, 556 F. 2d 665 (2nd Cir., 1977); Demers v. Brown, 343 F.2d 427 (1st Cir., 1965); Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir., 1969)

23 See Ledwith v. Storken 2 FRD 539 (1942), where the Court refused to vacate due in part to the fact that plaintiff was not unduly punctual in taking judgment but waited for 3-1/2 months to elapse before he demanded a default judgment based on defendant's failure to answer his complaint.

24 See Torockio v. Chamberlain Mfg. Co. 56 FRD 82.

25 See Torockio v. Chamberlain, 56 FRD 82, where plaintiff filed the jurisdictional document approximately three months after a 30-day limit expired. See also Ohliger v. U.S., 308 F.2d 667 (2nd Cir., 1962), where plaintiff's attorney failed to answer interrogatories for over two years; see Ledwith v. Storken 2 FRD 539, (1942) where it took defendants over five months to move to vacate the default judgment

This is a case, however, where in its memorandum in support of its Rule 55(b)(2) motion and in an affidavit in support of its Rule 60(b)(1) argument, plaintiffs did not take issue with defendants counsel on the question of excusable neglect.[26] In spite of this concession and waiver by plaintiffs, the District Court nonetheless determined that defendants' counsel's non-prejudicial, insubstantial error to be non-excusable. Based on the persistent judicial tendency to review lower court denials of 60(b)(1) relief carefully,[27] and the Circuit Court reversals under cases similar to the instant one, and the equitable principles governing the application of Rule 60(b)(1), this Court should reverse that unjust determination.

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[26] See Plaintiffs' Memorandum of Law in support of 55(b)(1) (A103 - A104), and Robert Fink's affidavit in opposition to Defendants' 60(b)(1) motion (A 215-A 218).

[27] See Butner v. Neustadter, 324 F.2d 783 (9th Cir., 1963).

POINT II

IN THE LIGHT OF THE LOWER STANDARD APPLIED UNDER RULE F.R.C.P. 55(b)(2) JUDGE WERKER CLEARLY ABUSED HIS DISCRETION IN GRANTING PLAINTIFFS' RULE 55(b)(2) MOTION

The applicable law with regard to whether a District Court should grant leave to enter a default judgment under Rule 55(b)(2) was set forth in Wallace v. DeWerd (D.C. Virgin Islands), 47 F.R.D. 4,5 (1969):

> "The entry of a default pursuant to Rule 55(b), Fed. R. Civ. P. is not a matter of right but is in the sound discretion of the Court. Default judgments are not generally favored and any doubt in entering or setting a default judgment must (emphasis added) be resolved in favor of the defaulting party. If a plaintiff has not been substantially prejudiced by the delay the defaulting party who has appeared before the court should (emphasis added) be afforded the opportunity to answer the complaint. Furthermore, when the question is whether to enter a default judgment rather than to vacate an existing default judgment, it is not absolutely necessary that the neglect or oversight on the part of counsel be excusable. (Cited cases omitted). Thus, it is unnecessary for the court to determine if the defendants default was through excusable neglect." (Emphasis added).

Applying this lower standard under Rule 55(b)(2), numerous courts have found that the moving party was not entitled to a default even though counsel committed substantially the same or more grievous mistakes than that which were committed here. For example, on facts strikingly similar to the instant case in Nunn v. Reina, 21 FRD 573 (D.C., Pa. 1958), defendant's failure to file a timely answer

resulted solely from his attorney's honest mistake that his entry of appearance had an identical effect under Federal and State practice. Noting that failure to file was due to a mistake, that counsel acted promptly to cure the mistake, that defendant asserted a defense on the merits and that the plaintiff would not be prejudiced by allowing the defendant to answer on the merits, the court set aside the default under Rule 55. The four conditions met by the defendant in Nunn have been satisfied by the defendants in this case: 1) Just as in Nunn, a late service was caused by defendants' attorney's erroneous assumption that identical rules govern State and Federal Practice. 2) Just as in Nunn, here counsel acted promptly in his attempt to cure his mistake. 3) Likewise, defendants asserted a meritorious defense.[29] (see next page for footnote) 4) Plaintiffs, also concededly would not have been prejudiced by allowing defendants to answer on the merits.[30] (see next page for footnote) Therefore, the same result should be reached here.

Similarly, in Finch v. Big Chief Drilling Company, 56 FRD 456, 458 (D.C.E.D., Texas, 1972), the lower court was faced with a ten day late filing due to defendant's attorney's erroneous interpretation of F.R.C.P. 4(e). Based on that mistake, he mailed his answer within the time he thought he was entitled to. Confronting these extenuating circumstances, the District Court stated that:

> "To grant plaintiffs motion in these circumstances would be in the words of Judge Brown '* * * a return to technicalities out of keeping with the aim declared in the very first Rule that 'they should be construed to secure the just, speedy and inexpensive determination of every action."

In light of these pervasive precedents governing the application of judicial discretion under Rule 55(b)(2), applied to the instant case, the District Court's imposition of a default under that Rule constituted a reversible abuse of discretion.

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29. Upon considering whether defendants prepared a meritorious defense in its rule 55(b)(2) opinion the District Court erroneously concluded that defendants did not satisfactorily show that that it had a meritorious defense. In making such a decision under Rules 55(b)(2) and 60(b)(1) the defendant need not show that he can win on the merits; it is sufficient to state defenses which, if established on trial, would defeat plaintiffs' action. Horn v. Intelectron Corp., 294 F. Supp. 1153. A glance through defendants' original timely served answer (A-11-A17) and defendants' untimely served answer to plaintiff's amended complaint (A-30-A-38) clearly demonstrates that defendants satisfied this burden on both their defense and counterclaims.

30. See also, Elias v. Pitucci, 13 FRD 13 (D.C., Pa., 1952); Teal v. Kings Farms Company, 18 FRD 447 (D.C. Pa., 1955), where default was removed under Rule 55 even though defendants' failure to appeal and plead resulted from his counsel's mistaken impression that he had completed dictating and mailing defendant's answer, U.S. v. Kelly, 50 FRD 149 (D.C.E.D. Pa., 1970), where defendant's unexplained failure to reanswer for over a month was excused under Rule 55(c); Kulakowich v. A-S Borgestad, 36 FRD 185 (D.C. Pa., (1964), where failure to respond was not due to gross neglect of defendant which led the court to strike the default even though defendant's counsel entered the case over a year after defendant had been served.

POINT III

THE DISTRICT COURT'S FAILURE TO WEIGH THE VARIOUS CONSIDERATIONS WHICH MUST BE CONSIDERED IN 55(b)(2) AND 60(b)(1) MOTIONS, IN AND OF ITSELF, CONSTITUTED AN ABUSE OF DISCRETION.

In deciding a Rule 60(b) motion,[30] the Court should balance the need for efficient and speedy justice against the injustice which may result upon a default judgment.[31] Thus, the determination that defendants' conduct was excusable or non-excusable should never be made in a vacuum which is exactly what the District Court did in the instant case.[32] Upon weighing the many factors which the Courts have deemed relevant in determining a Rule 60(b)(1) motion it becomes very clear that the District Court's failure to address these considerations resulted in an arbitrary and unjust decision.[33]

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30 From this point on anything said about Judge Werker's decision on Rule 60(b)(1) and the judicial interpretations of that Rule also apply to his determination of Rule 55(b)(2) and the judicial interpretations under that Rule.

31 See, Trueblood v. Grayson Shops of Tennessee, 23 FRD 190.

32 See, Tozer v. Krause Milling Company, 189 F2d 242 (3rd Cir., 195).

33 This failure of the District Court is particularly unjustified in light of the fact that Judge Werker granted plaintiffs' motion conditionally on the grounds that defendants had not shown conclusively that they had a meritorious defense and subsequently did not even consider the exhaustive affidavits and exhibits which defendants submitted to support its Rule 60(b) motion. See Defendants' notice of motion to vacate under Rule 60(b)(1) and attached exhibits and

(footnote continued on next page

A. The District Court's Failure to Consider the Meritoriousness of Defendants' Defenses And Counterclaims and the Absence of Prejudice Was an Abuse of Discretion.

Perhaps, the most significant abuse of discretion committed by the court below was its failure to consider whether defendants' counterclaims and defenses were meritorious[34] and its failure to consider the issue of prejudice despite the fact that most Circuit Courts consider these two issues upon determination of 60(b) motions. Under such circumstances, the Third Circuit has imposed a very clear cut rule:

A denial of a motion to set aside a default judgment on defendants' negligent failure to timely plead to a complaint without determining whether prejudice would accrue to the plaintiff if the motion was granted, and whether a meritorious defense has been presented in support of the satisfied motion is an abuse of discretion entitling the

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(footnote continued from prior page)

affidavits (A-122 -A-162 A-219- A-238) and Judge Werker's Memorandum Decision dated July 22, 1977 (A-239-A-243).

34 The District Court did consider the merits of defendants' claims in its Rule 55(b)(2) opinion but failed to do so in its Rule 60(b)(1) decision. It did not consider the prejudice issue in either of its opinions (A-117-A-119- A-239- A-243).

defendant to a reversal. Medunic v. Lederer, 533 F. 2d 891, 893 (3rd Cir. 1976).[31]

The Third Circuit's rule does not require granting a 60(b)(1) motion upon a showing of "meritoriousness" and "no prejudice" especially where the party was grossly negligent.[32] However, once a defendant demonstrates meritoriousness, as was done here, the Court should give weight to such showing when determining defendants' neglect.

If the Medunic holding is adopted by this Court, it would insure that the equitable nature of Rule 60 requires due consideration to the issues of prejudice and meritoriousness in every case where the court is faced with a question of whether counsel demonstrated sufficient care to make his mistake, inadvertence or neglect "excusable" under

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31 See also Diversified Utilities Sales, Inc. v. Monte Fusco Excavating Contracting Company, 71 FRD 661, 665 (D.C. Pa., 1976); Tozer v. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951); Patapoff v. Vollstedts Inc., 267 F. 2d 863 (9th Cir., 1959), where the 9th Circuit ruled that the trial court had abused its discretion for not considering defendants meritorious defense; See also Rasmussen v. W.E.Hutton & Co., 63 FRD 231, 238 (1975), where the court stated that it "must consider whether there will be undue prejudice to plaintiffs if the defendants are taken out of default."

32 See Schwarz v. United States, 384 F.2d 833 (2nd Cir.1967), where plaintiffs case was dismissed because plaintiffs counsel took no steps to prepare the case for trial during the five years the case was pending and was not prepared to proceed on the date set for trial. In light of such gross neglect this court refused to dismiss even though plaintiff may have had a meritorious cause of action.

Rule 60(b)(1).

Most District Court judges in this Circuit presently and customarily consider the merits and the prejudice issues when considering FRCP 55(b)(2) and FRCP Rule 60 motions.[33] Defendants respectfully requests that this Court by its decision, reconfirm these District Court holdings in the instant case.

B. The District Court Unjustly Failed to Consider the Large Sums of Money Involved in the Defaulted Claim and the Fact that the Defaults Could Have Been Avoided if Plaintiffs Had Warned Defendants' Counsel of the Imminent Default.

The plaintiffs in their claim for professional services demanded $14,316.51 (plus interest), and a total of $1,000,000.00 for their causes of action, lying in defamation.[34] Defendants' counterclaims requested a total of $1,500,000 for damages resulting from plaintiff's negligence.[35]

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33 See Horn v. Intelectron Corp., 294 F. Supp. 1153 (S.D.N.Y., 1968) where Judge Lasker stated "granting this motion the Court has necessarily considered the extent to which its action might prejudice the plaintiff". . . and further stated "the propriety of granting the motion is reinforced by the fact that the defendant raises both respectable, factual and legal defenses on the merits." See also Morris v. Charnin, 85 FRD 689 (S.D.N.Y., 1980) where Judge Knapp granted defendants motion to vacate under Rule 55(b) because plaintiff's counsel conceded that no substantial prejudice would likely result if default were to be set aside and because defendant's counsel set forth a possible meritorious defense. See also Securities and Exchange Commission v. Vogel, 49 FRD 297 (S.D.N.Y. 1969) where Judge Croake vacated under Rule 55 because no substantial prejudice would result to plaintiff; defendants had not been guilty of gross negligence; and defendants claimed existence of and presented a factual basis of a meritorious defense.

34 (A 24 - A 29)

35 (A 30-A 38)

Therefore, the combined claims involved a total of over $2,500,000.

Judge Lasker in Horn v. Interlectron, 294 F. Supp. 1153, 1155 (1968), declared that:

> "Matters which involve large sums of money should not be determined by default judgments if it reasonably can be avoided." 36

Certainly in light of the spirit of Rule 60(b) and judicial precedent the lower court should have at least acknowledged the large sums demanded in the litigation.

In addition, the District Court, in light of the equitable constraints of Rule 60(b) should have given consideration to the fact that the plaintiffs could have easily prevented the default by warning defendants' counsel of the imminent default. This factor was recently taken into account in Judge Knapp's decision to vacate in Morris v. Charnin, 85 FRD 689 (D.C., N.Y., 1980). The District Court in Nunn v. Reina, 21 FRD 573, 575 made the following apt commentary on party's like the plaintiffs who immediately move to impose a default upon procedural grounds, without warning:

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36 See also Trueblood v. Grayson Shops of Tennessee, 32 FRD 190 (1963); Schwab v. Bullock's Inc., 508 F. 2d 353 (1974); Rooks v. American Brass Co., 263 Fed. 166 (6th Cir., 1959).

"On the rare occasions when they (referring to innocent mistakes) do occur, opposing counsel (should) will remember the imperfections of man and (should) be mindful of the Golden Rule."

POINT IV

IT WAS AN ABUSE OF DISCRETION FOR THE DISTRICT COURT NOT TO HAVE FOUND THAT THE SHORTNESS OF THE DELAY, THE FACT THAT DEFENDANTS WERE NOT PERSONALLY RESPONSIBLE FOR THE ERROR, THE ABSENCE OF GROSS NEGLECT OR WILLFULNESS, THE CANDOR OF DEFENDANTS' COUNSEL, THE LARGE SUMS OF MONEY INVOLVED, THE FACT THAT PLAINTIFFS WERE UNDULY PUNCTUAL IN MOVING FOR DEFAULT, THE FACT THAT DEFENDANTS' COUNSEL PROMPTLY MOVED TO BLOCK PLAINTIFFS' RULE 55(b)(2) MOTION, THE LACK OF PREJUDICE TO THE PLAINTIFFS, THE ASSERTION OF MERITORIOUS CLAIMS, THE FAILURE OF PLAINTIFFS TO WARN, THE FACT THAT DEFENDANTS WERE NOT GIVEN THEIR DAY IN COURT, DID COLLECTIVELY OUTWEIGH THE ILLUSORY BENEFIT OF JUDICIAL EFFICIENCY DERIVED FROM INVOKING DEFAULT AND REMANDING THE CASE FOR A COMPLICATED HEARING TO DETERMINE DAMAGES.

A. The Lower Court's Decision Did Not Significantly Promote Judicial Efficiency.

Because of the complexity of the damages issue on plaintiffs' defamation claims, further judicial proceedings were required. They included a reference to a Magistrate, pre-hearing conferences, written submissions, memoranda of law, testimony, marshalling of evidence, an assessment of damages hearing the issuance of the Magistrate's report,

the parties' response to the Magistrate's report, the Court's final determination on the Magistrate's report, these proceedings burdened the Court, parties and counsel substantial time, energy and expense. In this case, these proceedings took three years to conclude and the work of two magistrates and three judges to finally assess damages and record a final judgment. A determination by trial on the merits would have long since been concluded. Thus, the District Court's decision did not promote the only benefit upon which its decision rested - judicial efficiency. The following simple, but cogent, observation which was made by the District Court of the Virgin Islands in Wallace v. DeWerd, 47 FRD 4, 5 (1969), sheds light upon this issue:

> "Even if the Court were inclined to enter a default judgment it would still have to hold a hearing to determine the type and terms of the relief to grant pursuant to the judgment. Since a hearing must be held in any event, it is best that if plaintiffs are entitled to judgment they should take it on the merits of their case, and not on what appears to be a secretarial miscue."

B. Defendants Demonstrated Meritorious Defenses and Counterclaims

Defendants' comprehensive affidavits and exhibits submitted in support of their motion to vacate under Rule 60 demonstrated that defendants had a meritorious defense to plaintiffs' complaint and that defendants had meritorious counterclaims.[37]

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[37] See next page for footnote.

Furthermore, defendants flatly denied making the utterances which plaintiffs claim were defamatory. There is no clearer defense than that.

C. Plaintiffs Were Not Prejudiced By The Untimely Service

Upon consideration of whether plaintiffs would suffer prejudice if the default were vacated, the District Court would have observed that defendants' ten-day delay in serving their answer in no way prejudiced the plaintiffs and that the plaintiffs nor the Court below ever asserted prejudice to the plaintiffs by reason of the tardy answer. Defendants' counsel had previously served in a timely fashion an answer to the original complaint containing the exact denials and counterclaims as set forth in the untimely second answer to the amended complaint.[38] The only new material in the untimely answer related to denials of the new defamation causes of action.

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[37] Defendants' counterclaims and defenses were based upon plaintiffs' breach of their professional duties to the defendants as clients in their representation of defendants in the sale of defendants' property located in Goshen, New York, and the subsequent foreclosure litigation which followed. The Court is referred to defendants' papers submitted in support of their 60(b)motion to vacate (A-124-A-162) (A-219-A-232)

[38] A 11-A 17

Thus, plaintiffs were fully advised of defendants' position relating to the first cause of action and defendant's counterclaims in detail before the untimely service of defendants' answer to plaintiffs' amended complaint. In light of these facts, plaintiffs could not, and did not, allege that they were prejudiced by the ten day delay. Yet Judge Werker, who had previously emphasized the lack of prejudice in permitting plaintiffs to amend their complaint eight months after their complaint was served, did not even consider lack of prejudice to plaintiffs in his decisions on the 55(b) and 60(b)(1) motions.

D. Other Equitable Factors Required to Be Weighed.

In Tolson v. Hodge, 411 F.2d 123 (1969), wherein a default was entered against plaintiff for a one day untimely filing, the Fourth Circuit found, based on the authorities and this Court's decision in Radack, that:

> "(T)he shortness of the delay involved the absence of gross neglect on the part of the plaintiff, the lack of prejudice to defendant, and the assertion of what may be a meritorious defense, collectively establish that there was an abuse of discretion on the part of the District Court in not relieving plaintiff of the default judgment and in permitting a response to the counterclaim out of time." 39

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39 See also Horn v. Intelectron, 294 F. Supp. 1153 (1968); A. F. Dormeyer Company v. M.J. Sales and Distributing Co., 461 F.2d 40, 7th Cir., 1972.

Similarly, in the instant case the following factors are present: shortness of the defaults involved, the absence of gross neglect or willfulness on the part of defendants' counsel, the candor of defendants' counsel, the fact that defendants were not personally responsible for the error, the lack of prejudice to the plaintiffs, the assertion of meritorious defenses and claims, the fact that defendants were not given their day in court on the merits, the promptness of defendants' counsel in moving to relieve his default, the large sums of monies involved, the failure of plaintiffs to warn and the fact that plaintiffs were unduly punctual in moving on the default. These elements, collectively, clearly mitigated in defendants' favor and outweighed the illusory benefit derived from an early procedural disposition of this case. The failure of the District Court to so find was an abuse of discretion.[40]

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40 This ground for reversal is independent of defendants' other asserted grounds for reversal - i.e., even without considering these other factors the District Court's refusal to find excusable neglect under 60(b)(1) and 55(b)(2) was an abuse of discretion.

POINT V

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY IMPOSING THE HARSH REMEDY OF DISMISSAL FOR A MINOR ERROR WHICH THE DEFENDANTS WERE NOT PERSONALLY RESPONSIBLE FOR.

There is an old and equitable common law doctrine which the courts have applied repeatedly as a basis for curing District Court abuses of discretion in FRCP 55 and 60 cases - "THE PUNISHMENT SHOULD FIT THE CRIME." In applying that doctrine to Rule 60(b) the Fifth Circuit in Flaksa v. Little Marine Construction Co., Inc., 389 F.2d 885, 887-888, 1968, stated that:

> "Dismissal is a discretionary matter, (which has been) generally permitted... only in the face of a record of delay or contumacious conduct by the plaintiff..."

and went on to declare the following mandate:

> "Dismissal of an action with prejudice and entry of a judgment by default are drastic remedies which should be used only in extreme situations as the court has a wide range of lesser sanctions." 41

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41 Although the Second Circuit has not as yet explicitly adopted the Fifth Circuit's interpretation of Rule 55(b)(2) and Rule 60(b)(1) (See Slumbertogs, Inc. v. Jiggs, 353 F.2d 720 where this Court may have adopted Medunic through negative inference.) The Rule 55 and 60 statutory mandates which proscribe that parties should be given just relief requires that the drastic sanction of default should not be instituted and a 60(b)(1) motion should not be denied unless there was a clear record of dilatory or contumacious conduct.

Based on this rule, the Fifth Circuit found that the lower court had abused its discretion in entering a default even though the plaintiffs' procter failed to appear at a pre-trial hearing which was set one hundred days prior to the date it was to be held, was given an eleven-day grace period, whereupon he failed to appear again, and where the procter had failed to meet his responsibilities at every stage of the proceeding.

Similarly, in Morisse v. Defensive Instruments, Inc. 55 FRD 433 (D.C. Wisconsin 1972) the Court recognized that a default judgment was too harsh a remedy and merely imposed pecuniary sanctions, despite defendants' unexplained failure to timely respond to plaintiffs' summons and complaint.[42]

The error in the instant case was no more substantial than the procedural violations made by counsel in Flaksa and Morisse, yet Judge Werker imposed the most severe sanction that a

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[42] See also Thorpe v. Thorpe, 364 F.2d 692 and Silas v. Sears Roebuck & Company, Inc., 586 F.2d 382 (5th Cir. 1978) where in reversing the District Court's refusal to vacate, the Court stated:

> "in determining whether there has been excusable neglect within the meaning of Rule 60(b)(1), we must consider not only the nature of the neglect involved (here, a failure to attend a pretrial conference) and the excuse offered to explain it (here, alleged confusion stemming from the assignment of a visiting judge) but also the severity of the dismissal sanction which has been imposed... Immediate imposition of the sanction of dismissal was much too severe a response to the failure of Silas' attorney to appear at the pretrial conference."

The same rational and ruling should be applied here.

court may apply - default.

Surely Judge Werker's bald statement that counsel may not properly be allowed with impunity to disregard the process of the Court (A-118) does not justify imposing such a drastic sanction. The choice here was not limited to either granting the motion to open the default or to deny it. Intermediate measures, such as a reprimand or imposition of costs, should have been taken, to "make the punishment fit the crime", especially since the timely service of the original answer demonstrated defendants' efforts to timely plead, defend and assert counterclaims in the case. Not having complied with the statutory mandate under Rule 55 and 60(b)(1) which provides for "relief upon such terms as are just", the District Court abused its discretion in its decisions below.

CONCLUSION

The decision below should be reversed, the default judgments should be vacated, and the case should be remanded to the trial court's docket.

Respectfully submitted,

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ADDENDUM - F.R.C.P. Rules 55 and 60

Rule 55. Default

(a) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) **Judgment.** Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) **Setting Aside Default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) **Plaintiffs, Counterclaimants, Cross-Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) **Judgment Against the United States.** No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MONA PERSCHETZ, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York. On March 31, 1981 deponent served the within Joint Appendix and Brief of Defendants-Appellants upon McCann, Rider, Drake, Weiner, Sommers and Loeb, P.C., attorneys for Plaintiffs-Appellees in this action, at 427 Little Britain Road, Post Office Box 991, Newburgh, New York 12550, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Mona Perschetz
MONA PERSCHETZ

Sworn to before me
this 31st day of March, 1981.

DONALD B. ROSENBERG
Notary Public, State of New York
No. 60-3350430
Qualified in Westchester County
Commission Expires March 30, 1983